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Supreme Court, U.S.
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No. 04-1043

In The Supreme Court of the United States

THE REPUBLIC OF CONGO, CMS NOMECO CONGO INC., THE NUEVO CONGO COMPANY, AND NUEVO CONGO LTD.,

Petitioners,

v.

AF-CAP, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT AF-CAP, INC. IN OPPOSITION

ROBERT P. CHARROW*
LAURA METCOFF KLAUS
RONALD W. KLEINMAN
GREENBERG TRAURIG LLP
Suite 500
800 Connecticut Ave., N.W.
Washington, D.C. 20006
(202) 331-3100

Attorneys for the Respondent

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In the proceedings below, Af-Cap, Inc. ("Af-Cap") was the plaintiff-appellant. Af-Cap, Inc. is a privately held company and there is no publicly-held company that holds more than 10% of Af-Cap's stock.

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INTRODUCTION

This is a simple commercial collection case against the Republic of Congo ("Congo"), a foreign state that has transformed the practice of commercial debt evasion into a serialized art form that would be the envy of Charles Dickens.[1] After having expressly waived its sovereign immunity and having agreed to consent to any enforcement proceedings against any property of any type located anywhere, Congo has nevertheless litigated this debt and lost in an English court, in a New York court by default, in a federal district court in Texas, twice in the Fifth Circuit, and is now before this Court. Against this backdrop, Petitioners argue that in permitting a judgment creditor (Af-Cap) to execute on its judgment, the Fifth Circuit erred when it referred to state rather than federal law in holding that the *situs* of a debt for garnishment purposes under the Foreign Sovereign Immunities Act ("FSIA") is the domicile of the garnishee. This putative choice of law error, according to Petitioners, led to a result that violates international law, implicates important foreign policy objectives of the United States, creates a split among circuits, and therefore, warrants this Court's attention.

The Writ should be denied for a number of reasons. First, the question presented in the Writ is not presented in this case. Second, there is no circuit split. The Fifth Circuit declined to address the very choice of law issue raised by Petitioners, because it correctly found that federal law, Texas law, and common law were all in accord: the *situs* of a garnished repayment obligation is the

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[1] *See* Charles Dickens, BLEAK HOUSE at Chapter 1 – In Chancery (1853).

location of the garnishee. The Fifth Circuit's decision involved no questions of law that were decided adversely to Petitioners, but rather questions of fact, namely, whether the Congo used its debt property in the United States for commercial purposes. Third, the Fifth Circuit's view that a debt owed to the Congo is located "in the United States" for garnishment purposes is consistent with established law and the holdings of this Court. Finally, Petitioner Congo lacks standing to prosecute this Writ because it expressly waived its immunity and consented to all enforcement proceedings. Petitioner oil companies are collaterally estopped because their predecessor in interest unsuccessfully litigated this issue in another proceeding and further, as stakeholders, their rights can be no greater than the rights of the Congo.

This is not to say that the Fifth Circuit correctly decided all legal issues; it did not. The Court erred when it refused to give full effect to the Congo's waiver of sovereign immunity and required Af-Cap to prove, as it ultimately did, that the property subject to garnishment was used by the Congo for commercial purposes in the United States. *See Connecticut Bank of Commerce v. The Rep. of Congo*, 309 F.3d 240 (5th Cir. 2002). If Congo's waiver of sovereign immunity were to be given full effect, then there would be no need to address the putative issues raised by Petitioners and further, Congo would have no contractual standing to prosecute this Writ: its contractual waiver requires it to

> consent[] generally in respect of any suit, action or proceedings arising out of or in connection with this Agreement to the giving of any relief, or the issuance of any process in connection with any such suit, action or proceedings including,

> without limitation, the making, enforcement or execution against any property whatsoever (irrespective of its use or intended use) of any order or judgment that may be made or given in such action or proceedings.

Loan Agreement at ¶ 19(C) (Dec. 18, 1984).[2] While Af-Cap, as the prevailing party, may not be able to raise that issue as independent grounds for review here, another case involving the same judgment debtor, the Congo, but a different loan obligation, a different creditor and different garnishees does raise that issue on which there is a legitimate circuit split. *See Walker Int'l Holdings Ltd. v. Republic of Congo*, No. 04-20301 (5th Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3473 (U.S. Feb. 7, 2005) (No. 04-1071).

STATEMENT OF THE CASE

This case began more than two decades ago, when the Congo executed a Loan Agreement with Equator Bank Limited. To obtain the loan, the Congo pledged as collateral "all of its assets and properties, wherever located," expressly waived any claim of sovereign immunity either from suit, attachment or execution on its property and agreed that it would not defend any such action. *See* Loan Agreement at ¶¶ 19(C), 19(D). It also consented to enforcement proceedings of any type. *See id.*

The Congo defaulted in 1985. Connecticut Bank of Commerce, an assignee of Equator Bank, obtained a

[2] In addition, the Congo expressly waived sovereign immunity under the FSIA. Loan Agreement at ¶ 19(D).

default judgment against the Congo in a London, England court. After negotiations with the Congo proved fruitless, Connecticut Bank filed suit against the Congo in a New York state court. The Congo did not appear and the court entered a default judgment in the amount of $13,628,340.11 in favor of the Bank. The New York court also entered an order of attachment, authorizing the Bank to execute against "any assets or other property of the Congo of any nature, irrespective of the use or intended use of such property . . . including any . . . payments or obligations due to the Congo from any oil and gas exploration and development companies. . . . "

On January 11, 2001, the Bank registered the New York judgment in a Texas state court and obtained a writ of garnishment directed to a group of Texas oil companies, now Petitioners, that were indebted to the Congo. *See* Pet. App. at 54a. These Texas oil companies were assignees of an original contract between Amoco and the Congo, under which Amoco agreed to explore and develop Congo's oil reserves for commercial purposes and share the proceeds, as royalties, with the Congo. The Congo and garnishees removed the case to federal court and moved to dismiss the garnishment actions. The district court dismissed the writs, the Bank appealed and the Fifth Circuit reversed and remanded, instructing the lower court to determine whether the property, namely the obligation to pay royalties, had been or was being used by the Congo for commercial purposes in the United States. The Fifth Circuit expressly declined to give effect to the Congo's contractual waiver of sovereign immunity holding that under the FSIA, 28 U.S.C. §§ 1609-1610, "[e]ven when a foreign state completely waives its immunity from execution, courts in the U.S. may execute only against property that meets

these two statutory criteria [in section 1610]." *Connecticut Bank of Commerce v. The Rep. of Congo*, 309 F.3d at 247. On remand, the district court again dismissed the writ. On appeal, the Fifth Circuit again reversed, holding that the property at issue for garnishment purposes is the debt owed by the Texas oil companies to the Congo and that debt had been used by the Congo in the past for purely commercial purposes in the United States, namely to satisfy another creditor. *See National Union Fire Ins. Co. of Pittsburgh, PA. v. The People's Rep. of the Congo*, No. 91 C 3172 (N.D. Ill. Dec. 5, 1991) ("*NUFI*"). Petitioners seek this Court's review of the Fifth Circuit's most recent decision.[3]

REASONS FOR DENYING THE WRIT

I. The Question Presented by Petitioners is not Present in this Case

Petitioners seek review of the following question: "Do the immunity exceptions from attachment and execution under § 1610(a) of the FSIA, which are limited to property that is 'in the United States,' reach a foreign sovereign's property rights in its own natural resources within its own territory?" That issue is not present in this case. The Fifth Circuit did not address, let alone resolve, the location of the Congo's natural resources. It did not have to. The primary questions before the Fifth Circuit were the *situs*

[3] On remand, the district court again dismissed the writs of garnishment, and instead, issued a turnover order in Af-Cap's favor. Petitioners have indicated that they intend to appeal that turnover order thereby raising a question whether this case is ripe for review at this time.

of the garnishees' debt obligation to the Congo and the character of that obligation, *i.e.*, commercial or non-commercial. That debt obligation (including the right to specify both the manner and place of payment), was correctly characterized by the Fifth Circuit as intangible property. *See* Petition at 9-10, *citing* Pet. App. 89a-90a. Af-Cap did not seek and the Fifth Circuit did not order attachment of any of Congo's oil or Congo's ownership interest in that oil. The purported circuit split involving the application of state versus federal law also is distinct from the question presented by Petitioners and therefore does not satisfy the "circuit split" requirement of Rule 10(a) of this Court.

II. There is No Circuit or State-Federal Split

The Petition rests on a fundamental misreading of the Fifth Circuit's opinion. Far from holding that the *situs* of a debt for garnishment purposes is governed by state, rather than federal law, the Fifth Circuit found it unnecessary to address the "choice of law" issue posited by the Congo because, whether applying state law, federal law or common law, the result was the same – the *situs* of a debt, for execution purposes, is the location of the debtor or garnishee, as the case may be. *See* Pet. App. at 17a-19a. (noting that the laws of Texas, New York, Montana, and Wyoming are in accord with each other and with the rule recognized by the Supreme Court in *Harris v. Balk*, 198 U.S. 215, 221-22 (1905) (holding that State law governs garnishment and that situs of a debt is wherever the garnishee can be found)).[4] Thus, where, as here, the Congo

[4] Nor is it unprecedented or even arguably improper for a court to employ this method of comparing federal, state and common law in

(Continued on following page)

entered into a commercial arrangement with a Texas company in which the Texas company became indebted to the Congo, then a judgment creditor of the Congo can garnish the debt owed by the Texas company to the Congo in a federal court located in Texas. There is nothing cataclysmic about this post-judgment remedy and certainly nothing that implicates any interest other than the commercial interests of the Congo. After all, this is a case solely about money. The only unusual aspect of the case is that the legal issue spot-lighted by Petitioners is devoid of controversy – every court, whether state or federal, agrees that the *situs* of a debt for garnishment purposes is the location of the debtor.

Without a real issue, there can be no circuit split and there is none here. Petitioners attempt to create a split by contrasting "act of state doctrine" cases, where the focus generally is on the asset side of the debt, with this garnishment case, where the focus always is on the obligation side of the debt. It is axiomatic that every debt is simultaneously an asset in the hands of the creditor and a liability in the hands of the debtor. *See Chicago, Rock Island & Pac. Ry. v. Sturm,* 174 U.S. 710, 714 (1899) (noting that the "right of a creditor and the obligation of a debtor are correlative but different"). Courts, both federal and state,

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order to identify a unifying principle and rule. To the contrary, it follows Supreme Court precedent in other contexts. *See California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 283 (1982) ("It may be determined as a matter of choice of law that, although federal law should govern a given question, state law should be borrowed and applied as the federal rule for deciding the substantive issues at hand."); *see also* Fed. R. Civ. P. 69 (specifying that proceedings on or in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held).

agree that whether the "asset side" or the "obligation side" will control depends entirely on the purpose of the inquiry. *See id.*

Petitioners' reliance on act of state doctrine cases to create their ersatz circuit split is misplaced for a variety of reasons. First, the act of state doctrine has nothing to do with FSIA immunity and even less to do with garnishment proceedings. The act of state doctrine does not apply to commercial arrangements such as this one. *See Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 690 (1976). In any event, under the act of state doctrine, "the courts of one [nation] will not question the validity of public acts (acts *jure imperii*) performed by other sovereigns *within their own borders*, even when such courts have jurisdiction over a controversy in which one of the litigants has standing to challenge those acts." *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S.Ct. 2240, 2254 (2004) (emphasis supplied). Where a foreign state confiscates property, for example, the key question is the location of that property. If the property is located wholly within the foreign state, then the act of state doctrine might apply and preclude an action in United States courts. If it is located outside that country, then the doctrine does not apply. However, "the [act of state] doctrine is to be applied pragmatically and flexibly, with reference to its underlying considerations." *Tchacosh Co. v. Rockwell Int'l Corp.*, 766 F.2d 1333, 1337 (9th Cir. 1985). Whether the asset side or obligation side will predominate in any given case is heavily fact and policy dependent making those cases highly inappropriate for synthesizing general propositions of law. But, even in the policy-intensive act of state arena, courts in most cases have concluded the location of a debt is with the debtor. *See e.g., Menendez v. Saks and Co.*, 485

F.2d 1355, 1364-65 (2d Cir. 1973), *rev'd on other grounds, sub. nom. Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682; *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706, 716 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968). The cases Petitioners rely upon to create the so-called circuit split are all act of state doctrine cases where the *situs* of the asset, as opposed to the *situs* of the obligation, was of significance and where that *situs* was determined "pragmatically" using commonsense. *See Tchacosh Co., Ltd.*, 766 F.2d 1333 (holding that for act of state purposes, confiscation by Iranian government of unliquidated contractual claims for services performed in Iran and payable only in Iran, occurred in Iran); *F. & H.R. Farman-Farman Consulting Eng'rs Firm v. Hazra Eng'g Co.*, 882 F.2d 281 (7th Cir. 1989) (holding that for act of state purposes, confiscation by Iranian government occurred in Iran); *cf Braka v. Bancomer, S.N.C.*, 762 F.2d 222 (2d Cir. 1985) (holding that for act of state purposes, *situs* of certificate of deposit and hence of the debt was the debtor bank in Mexico and therefore, confiscation was complete in Mexico). Petitioners presented no post-judgment remedy case and no case involving the FSIA.

Second, this Court repeatedly has emphasized that the FSIA and the act of state doctrine are separate and distinct – one is a creature of the Congress, the other is a creature of the courts. *See Republic of Austria v. Altmann*, 124 S.Ct. at 2254-55 (recognizing a sharp difference between FSIA jurisprudence and the act of state doctrine); *F. Hoffmann-LaRoche, Ltd. v. Empagran, S.A.*, 542 U.S. ___, 124 S.Ct. 2359, 2371 (2004) (declining to analogize from act of state doctrine to other areas); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1125 (5th Cir. 1985) (noting

that "the balance struck in regard to each doctrine [act of state *versus* FSIA] may be different."). This case involves the execution in aid of judgment provisions of the FSIA and not the act of state doctrine; therefore, one must examine, as the Fifth Circuit did in this case, the *situs* of the obligation for garnishment purposes and not the *situs* of the debt for tax, escheat, or act of state purposes. Under federal law, state law, and common law, the *situs* of a debt for garnishment purposes is the domicile or location of the debtor, not the creditor. This has been settled law since the late-19th century and Petitioners point to nothing in the FSIA or elsewhere that would indicate otherwise. *See Harris v. Balk,* 198 U.S. at 222-23, 225; *Chicago, Rock Island & Pac. Ry. v. Sturm*, 174 U.S. at 715-16.

Petitioners attempt to muddy the waters, by focusing on the so-called tangible property, *i.e.*, oil, that is responsible for generating the royalties due to the Congo. However, Af-Cap is not attaching those assets, but rather is garnishing the intangible debt owed by the garnishees to the Congo. Other courts under similar circumstances have had no difficulty placing the debt in the United States for garnishment purposes, notwithstanding the location of the oil that is used to create the debt. Indeed, the Congo expressly authorized a perpetual garnishment by a United States court against this very debt. *See NUFI*, *supra* at 5.

III. The Fifth Circuit's Construction of the Term "in the United States" is Consistent with this Court's Precedent

Petitioners also argue that certiorari ought to be granted because the Fifth Circuit's interpretation of the phrase "in the United States," in 28 U.S.C § 1610, conflicts with this Court's decision in *Argentine Rep. v. Amerada*

Hess Shipping, 488 U.S. 428 (1989), and that situs of the Texas companies' debt to the Congo ought to be the Congo, because the oil that generates the debt is pumped off-shore the Congo and not in the United States. Petitioners' argument fails for at least three reasons. First, *Amerada Hess* does not deal with the location of intangible property such as a debt, but rather focuses on the location of a ship destroyed in a military attack on the high seas. Second, Petitioners' argument that the Fifth Circuit decision affecting commercial undertakings is at odds with international law is nothing more than a backdoor assertion that the act of state doctrine should govern commercial activities. This Court, though, has consistently rejected that notion and it was not pursued by Petitioners in the Fifth Circuit. And third, Petitioners' argument would effectively repeal by implication section 1610(a) by precluding virtually all garnishment actions in aid of judgment since the foreign state creditor is, by definition, always located outside the United States.

A. *Argentine Republic v. Amerada Hess Shipping* is Not Relevant

In *Amerada Hess Shipping*, a Liberian tanker transporting fuel oil between two United States' ports was attacked on the high seas and severely damaged by Argentine forces. At the time, hostilities existed between Argentina and Great Britain over the ownership of the Falkland Islands. The owners of the ship and the fuel oil sued Argentina under the Alien Tort Statute and under principles of admiralty law. Argentina asserted immunity from suit under the FSIA. In response, the plaintiffs argued that the FSIA did not grant immunity with respect "to noncommercial torts occurring in the United States,

§ 1605(a)(5)." *Id.* at 439. Plaintiffs argued that although the ship was 5,000 miles from the United States at the time of the attack, United States admiralty jurisdiction nonetheless extended to the high seas and therefore, the tort occurred in the United States. The Court rejected this strained interpretation adopting instead, the normal reading of the term "in the United States." There is nothing in *Amerada Hess* to suggest, imply or even hint that where intangible property is involved, the normal rules to ascertain its *situs* ought not to pertain. To the contrary, the *Amerada Hess* Court used the normal rules of commonsense to determine that the *situs* of a ship 5,000 miles from the United States was not in United States waters for tort purposes. *Amerada Hess* does not provide any reason to grant this petition.

B. The Fifth Circuit's Determination that a Debt is Located in the United States for Garnishment Purposes is Consistent With the Holdings of this Court and Does Not Implicate the Law of Nations

Petitioners suggest a special rule for ordaining the location of intangible property for FSIA purposes. To do otherwise, Petitioners argue, would be inconsistent with international law, the law of nations, and by implication, the act of state doctrine. Petitioners provide no citation for this rather remarkable proposition, as none exists. To the contrary, this Court has consistently held that commercial disputes involving sovereign states do not implicate the law of nations and that the "act of state doctrine [does not apply] to acts committed by foreign sovereigns in the course of their purely commercial operations." *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. at 706.

C. Petitioners' Argument Would Repeal By Implication Section 1610

In Petitioners' view, the foreign state should be allowed to decide the *situs* of any debt owed to it. Aside from ignoring established United States law to the contrary and inviting fraudulent manipulations by scofflaw foreign governments such as the Congo,[5] Petitioners' interpretation effectively precludes garnishment under 28 U.S.C. § 1610(a), because intangible property in the form of a debt would never be located in the United States. Statutes are never interpreted to be self-repealing, yet that is precisely the interpretation championed by Petitioners. Petitioners "encounter head-on the 'cardinal rule . . . that

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[5] The Congo suggests that the post-judgment remedy sought by AfCap would undermine the efforts of the IMF and World Bank to restructure its debt. Petition at 26-27. Even if relevant, which it is not, there is nothing in the record to support it. Moreover, for the past twenty-one years, the Congo has refused to negotiate this debt even when it was held by the United States government in 2002, through the Resolution Trust Corporation, as receiver for Connecticut Bank of Commerce. Finally, its description of the IMF's policy ignores that although the IMF recommended some restructuring, at the time of the Fifth Circuit's decision in 2004, the IMF expressly declined to assist the Congo because the Congo had failed to implement changes to improve its economic and governmental transparency. The IMF had concluded that the Congo's government was more "corrupt" than other similarly situated nations and more "corrupt" than other nations in "sub-Saharan Africa." *See* International Monetary Fund, Republic of Congo: Selected Issues and Statistical Appendix, IMF Country Report No. 04/231 at 31 (July 2004). Of course, the FSIA was designed and enacted by Congress to eliminate precisely these types of political considerations. *See Williams v. The Shipping Corp. of India*, 653 F.2d 875, 878 (4th Cir. 1981) (paraphrasing H.R. Rep. No. 1487, 94th Cong. 2d Sess. (1976), reprinted in 1976 U.S. Code Cong. and Admin. News 6604, 6631, 6634, and noting that the FSIA "depoliticizes the issue of sovereign immunity and places on the judiciary the responsibility of deciding whether in a given case a foreign sovereign is entitled to immunity.").

repeals by implication are not favored.'" *Morton v. Mancari*, 417 U.S. 535, 549 (1974) (citations omitted); *see Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (holding that "interpretations of a statute which would produce absurd results are to be avoided").

IV. None of the Petitioners Has Standing to Pursue this Writ

Perhaps the most intriguing aspect of this Petition has nothing to do with its merits, and everything to do with whether the Congo or the garnishees even have the legal authority to pursue a writ of certiorari. In the Loan Agreement, the Congo explicitly agreed to allow "enforcement or execution against any property whatsoever (irrespective of its use or intended use)." Loan Agreement at ¶ 19(C). Having waived its right to challenge a writ of garnishment against any property, it has waived its right to seek review in this Court. As this Court has consistently noted, rights, whether constitutional or governmental, can be waived. A party, for commercial or other purposes, "may waive any provision [of the Constitution]." *See United States v. Mezzanatto*, 513 U.S. 196, 201 (1995), *quoting Shutte v. Thompson*, 15 Wall. 151, 159 (1873) (First Amendment rights); *Rust v. Sullivan*, 500 U.S. 173 (1991), *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), *Boykin v. Alabama*, 395 U.S. 238, 243 (1969), *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938) (Fourth, Fifth and Sixth Amendment rights), and *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (right to trial in court). Correspondingly, a government can waive "a sovereign power through contract," and that is precisely what the Congo has done in this case. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982). *See also Frew v. Hawkins*, 540 U.S. 431 (2004)

(reaffirming that a state can waive its Eleventh Amendment rights); *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990). Whether the FSIA precludes such a waiver, as the Fifth Circuit held in this case and in *Walker Int'l Holdings*, or permits such a waiver, as the Second Circuit held in *Caribbean Trading v. Nigerian Nat'l Petroleum*, 948 F.2d 111 (2d Cir. 1991), *cert. denied*, 504 U.S. 910 (1992), is the central issue raised in Petition for Writ of Certiorari in *Walker Int'l Holdings*. If the Congo has waived its right to object to the garnishment, then too have the garnishees since they are mere stakeholders and lack an independent interest.[6]

Moreover, the garnishees have litigated this precise issue and lost, and therefore are collaterally estopped from pursuing relief here. In *NUFI*, *supra* at 5, Amoco, the garnishees' predecessor-in-interest, challenged a turnover order directing Amoco to pay over to a judgment creditor of the Congo royalty payments under the same agreement that binds the Congo and the garnishees in this case. *See* Pet. App. at 144a-200a. The court, in upholding the turnover order, concluded that "the immunity rules in §§ 1609 and 1610 for execution upon foreign state property are not rules of subject matter jurisdiction. Immunity under § 1609 may be waived. It has been waived by The Congo." Slip op. at 8. The court went on to hold that the garnishee lacked standing "to raise any immunity defense under § 1609." *Id.* at 10. Since it has already been determined

[6] The Congo not only waived its immunity in the Loan Agreement, but it waived its immunity again when it allowed a default judgment authorizing execution to be entered against it by the New York state court. The district court and then the Fifth Circuit failed to give this judicial waiver full faith and credit.

that the garnishee Petitioners lack standing to raise FSIA defenses, principles of non-mutual collateral estoppel preclude them from raising the same issue here. *See United States v. Mollier*, 853 F.2d 1169, 1175 n.7 (5th Cir. 1988) ("[T]he principle of non-mutual collateral estoppel is that if a litigant has fully and fairly litigated an issue and lost, then third parties unrelated to the original action can bar the litigant from re-litigating that same issue in subsequent suit."). Therefore, the garnishee Petitioners lack standing[7] to prosecute this writ which is premised on FSIA immunity.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should not be granted.

Respectfully submitted,

ROBERT P. CHARROW*
LAURA METCOFF KLAUS
RONALD W. KLEINMAN
GREENBERG TRAURIG LLP
Suite 500
800 Connecticut Ave., N.W.
Washington, D.C. 20006
(202) 331-3100

Attorneys for the Respondent

**Counsel of Record*

[7] In *Walker Int'l Holdings*, one of the questions presented is whether garnishees lack representational standing where the foreign state has waived its immunities under the FSIA and declined to participate in the proceedings.